

1 Traeger Machetanz, Esq.
Thomas R. Krider, Esq.
2 OLES MORRISON RINKER & BAKER, LLP
745 Fourth Avenue, Suite 502
3 Anchorage, AK 99501-2136
Telephone: (907) 258-0106
4 Telecopier: (907) 258-5519

5 Attorneys for Nugget Construction Co., Inc.,
6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
9 STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
10 STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
11 Handling, on its own behalf,)

No. A98-009 CIV (HRH)

12 Plaintiffs,)

13 and)

14 UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
d/b/a Marathon Fuel Service, and)
15 SHORESIDE PETROLEUM, INC., d/b/a)
Marathon Fuel Service, on its own)
16 behalf,)

17 Intervening Plaintiffs,)

18 and)

19 METCO, INC.,)

20 Intervening Plaintiff,)

21 vs.)

22 NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

24 Defendants.)
25

MEMORANDUM IN SUPPORT OF
NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY
CO., INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST SHORESIDE
PETROLEUM, INC.

1 Pursuant to Federal Rule of Civil Procedure 56, Defendant Nugget
2 Construction, Inc. ("Nugget") respectfully moves for summary judgment
3 on claims alleged by Intervening Plaintiff/Use-Plaintiff Shoreside
4 Petroleum, Inc. ("Shoreside"), in support of any and all entitlement
5 to damages sought in its Amended Complaint filed September 22, 2005¹
6 that were incurred in fact prior to the Support Agreement between
7 Nugget and Spencer Rock Products, Inc. ("Spencer Rock") that was
8 executed on or about April 23, 1997. As Nugget demonstrates herein,
9 there is no genuine issue as to any material fact and Nugget is
10 entitled to summary judgment as a matter of law.

11 Introduction

12 As a consequence of the Ninth's Circuit's earlier decision in
13 this matter, Shoreside amended its complaint to revamp its claims
14 under the federal Miller Act, as well as add a host of claims under
15 Alaska state law. As amended, Shoreside's complaint now alleges that
16 Spencer Rock became a "strawman" of Nugget, and that the contractual
17 relationship between Nugget and Spencer Rock permits a "telescoping"
18 to Shoreside, as a consequence of the Support Agreement. Shoreside's
19 Amended Complaint, Sept. 22, 2005, ¶ 18. Significantly, this is
20 Shoreside's sole remaining theory for recovery under the Miller Act, a

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¹ To the extent that Shoreside asserts state law claims against Nugget's
surety, United States Fidelity & Guaranty Company ("USF&G"), USF&G moves for
partial summary judgment on all grounds raised by Nugget herein.

1 theory which Shoreside also attempts to extend, directly and
2 indirectly, to several of Shoreside's state law claims.²

3 The instant motion is directed at Shoreside's remaining strawman
4 theory of recovery under the federal Miller Act, as well as its
5 related claims under Alaska state law, in connection with damages that
6 Shoreside seeks to recover that were incurred prior to the execution
7 of the Support Agreement between Nugget and Spencer Rock on or about
8 April 23, 1997. Specifically, Shoreside has not alleged any fact or
9 introduced any evidence that purports to reduce Spencer Rock to a
10 strawman of Nugget prior the execution of the Support Agreement, or
11 that would otherwise permit a telescoping of the relationship between
12 Nugget and Spencer Rock to create an implied-in-fact contract between
13 Nugget and Shoreside prior to the execution of the Support Agreement.
14 As discussed below, this is consistent with the Court's prior express
15 holdings in this matter. Consequently, for the reasons stated herein,
16 Nugget is entitled to partial summary judgment as a matter of law.

21 ² All of Shoreside's state law claims, including those claims that are based
22 on the same or similar facts as Shoreside's Miller Act claims, are the object
23 of Nugget's motion for summary judgment against Shoreside filed April 24,
24 2006.

Argument³

A. SUMMARY JUDGMENT STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure instructs that a motion for summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Federal summary judgment procedure requires the piercing through the pleadings and their adroit craftsmanship to reach the substance of the claim. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. *See id.* Accordingly, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

³ Because the instant motion and Nugget's Motion for Summary Judgment against Shoreside filed April 24, 2006 arise out of the same operative facts and circumstances, Nugget hereby incorporates by reference its Statement of Facts and accompanying affidavits set forth in its April 24, 2006 Motion for Summary Judgment rather than repeat such facts in their entirety herein.

1 B. SHORESIDE MAY NOT RECOVER DAMAGES THAT WERE ALLEGEDLY INCURRED
2 PRIOR TO THE EXECUTION OF THE SUPPORT AGREEMENT BECAUSE SHORESIDE
3 HAS FAILED TO ALLEGE FACTS ESTABLISHING SUCH ENTITLEMENT

4 Shoreside's Amended Complaint, which seeks \$53,501.01 in damages
5 for fuel and lubrication services rendered in connection with the
6 Homer Spit Project (the "Project"), refers repeatedly and expressly to
7 the Support Agreement as the factual basis for its federal Miller Act
8 claim, see Shoreside's Amended Complaint, ¶¶ 18-21, as well as for
9 several of its state law claims. See, e.g., *id.*, ¶¶ 29 (Agency), 33
10 (Misrepresentation and Nondisclosure), 36 (Equitable Subordination),
11 37 (Constructive Trust). As alleged by Shoreside, the Support
12 Agreement "allowed Nugget to intercept and pay itself first from the
13 government payments that it was otherwise obligated to pay Spencer for
14 that rock work." *Id.*, ¶ 18. Shorside alleges further that,
15 "[t]hrough its same so-called 'support' agreement with Spencer and its
16 other acts, conduct and purposeful omissions, Nugget became the
17 undisclosed, but very real, principal of Spencer, thereby directly
18 obligating Nugget (and USF&G as well) to pay Shoreside according to
19 the specific terms of the Shoreside contract entered into by Spencer
20 and assumed by Nugget/USF&G." *Id.*, ¶ 20.

21 Here, it is undisputed that the bulk of Shoreside's damages were
22 incurred incident to the delivery of the second and third of "three
23 separate railcar loads of fuel and other petroleum products
24 [delivered] to Spencer Rock at the quarry site. The first was
25 delivered on February 4, 1997. The second was delivered on April 8,

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1 1997. The third was delivered on May 21, 1997." *Id.* at 12-13.
2 Shoreside invoiced Spencer Rock for these three deliveries \$24,028.73,
3 \$21,503.30 and \$21,278.53 respectively, and Spencer Rock paid
4 Shoreside in full for the first delivery. *See id.* at 13.

5 In its August 30, 2002 decision in the above captioned matter,
6 the Court set forth the basis for liability under the federal Miller
7 Act:

8 [W]here there is "subterfuge, collusion between the prime
9 contractor and subcontractor or circumstances indicating
10 the interposition of straw men, presumably for the purpose
11 of insulating the prime contractor and surety company from
12 extensive Miller Act liability[,] the "paper
13 subcontractor" can be ignored in the chain of parties.
14 Fidelity & Deposit Co. of Maryland v. Harris, 360 F.2d 402,
15 410 (9th Cir. 1966). This results in a court "telescoping"
16 the otherwise too remote contractual relationship directly
17 to the prime contractor. *Id.* In other words, a direct
18 contractual relationship with a prime contractor can be
19 implied from the prime contractor's acts despite the
20 existence of an intermediary entity which is found to be
21 nothing more than a straw man.

22 *United States of America d/b/a North Star Terminal & Stevedore Co., et*
23 *al. v. Nugget Construction, Inc., et al.*, Slip Op. No. A98-0009-CV
24 (filed Aug. 30, 2002), at 19.

25 Independent of the arguments raised in Nugget's April 24, 2006
motion for summary judgment against Shoreside on its state law claims,
and independent of the arguments that Nugget will make in opposition
to Shoreside's federal Miller Act claims, Shoreside is not entitled to
damages for losses that were incurred before the execution of the
Support Agreement on or about April 23, 1997, because Shoreside has

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1 failed to allege any fact to support the existence of a "direct
2 contractual relationship," *id.*, under the Miller Act, as well as an
3 implied-in-fact contract under Alaska state law, which requires all of
4 the elements of an express contract and, significantly, an intent to
5 be bound. See *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130,
6 1140 (Alaska 1996).

7 This is consistent with the Court's prior findings:

8 Although at the time of contract with plaintiffs Spencer
9 was not a "paper" party, the terms of the support
10 agreement, and Nugget's acts subsequent to it, rendered it
11 so. By virtue of the support agreement and Nugget's own
12 subsequent actions, Nugget stepped into the shoes of
Spencer, acting from that point onward as its own material
supplier, directly accepting and using the labor,
equipment, and services provided by North Star, Shoreside
and Metco.

13 *Id.* at 19-20. The Court also held that: "It is undisputed that at
14 the time Spencer negotiated with [Shoreside], Spencer acted completely
15 on its own behalf. There are no facts in the record supporting the
16 inference that Spencer acted as an agent of Nugget at the time Spencer
17 hired . . . Shoreside." *Id.* at 5. Moreover, the Court found that
18 "LaPore admits that Spencer ordered and is responsible to pay for the
19 first two shipments from Shoreside." *Id.* at 14.

20 Although the consequence of Nugget's actions subsequent to the
21 execution of the Support Agreement remain the subject of dispute, the
22 record is unequivocally clear in its absence of any fact or allegation
23 that would support Shoreside's entitlement to damages from Nugget that
24 were incurred prior to the execution of the Support Agreement.

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
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1 Specifically, Shoreside's allegations and the clear record are absent
2 any evidence that Spencer Rock was converted to a "paper party" prior
3 to the execution of the Support Agreement, or that an implied-in-fact
4 contractual relationship between Nugget and Shoreside was created
5 prior to the execution of the Support Agreement, or that Spencer Rock
6 or Mr. LaPore ever became an agent of Nugget prior to the execution of
7 the Support Agreement.

8 Moreover, because Shoreside did not appeal the findings in the
9 Court's August 30, 2002 decision consistent with the foregoing
10 conclusions, it has waived its right to do so going forward. See
11 *Kesserling v. Arctic Hero*, 95 F.3d 23, 24-25 (9th Cir. 1996) ("Since
12 appellant failed to raise this issue in its first appeal, it is
13 waived.").

14 Conclusion

15 Because there is no basis for liability under the federal Miller
16 Act or Alaska state law for alleged damages incurred prior to the
17 execution of the Support Agreement on or about April 23, 1997, Nugget
18 is entitled to partial summary judgment as a matter of law in
19 connection with any and all of Shoreside's claims for damages incurred
20 prior to April 23, 1997.

1 Dated: May 1, 2006

2 OLES MORRISON RINKER & BAKER LLP

3 Attorneys for Nugget Construction,
4 Inc., and United States
5 Fidelity and Guaranty Co.

6 By: s/Thomas R. Krider

7 Thomas R. Krider

8 krider@oles.com

9 Washington Bar No. 29490

10 745 West 4th Avenue, Suite 502

11 Anchorage, AK 99501

12 Phone: (907) 258-0106

13 Fax: (907) 258-5519

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st
day of May, 2006, a true and correct
copy of the foregoing was served

electronically, via ECF on:

Michael W. Sewright, Esq.
mws@bpbk.com
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Steven J. Shamburek, Esq.
shamburek@gci.net
Law Office of Steven J. Shamburek
425 G Street, Suite 630
Anchorage, AK 99501-5872

Paul Stockler, Esq.
paulstockler@aol.com
1309 West 16th Avenue
Anchorage, AK 99501

Herbert A. Viergutz, Esq.
barmar@gci.net
Barokas Martin & Tomlinson
1029 West Third, Suite 280
Anchorage, AK 99501

and by U.S. Mail on:

C. Patrick Stoll, Esq.
Herrig Vogt & Stoll LLP
4210 Douglas Bay Blvd., Suite 100
Granite Bay, CA 95746-5902

OLES MORRISON RINKER & BAKER LLP

By: s/Thomas R. Krider

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